

10-15-2010

The Opulent or the Oppressed? Expedited Removal as a Violation of the American Ideal

Amy Wingfield

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/naalj>



Part of the [Administrative Law Commons](#), [Human Rights Law Commons](#), and the [Immigration Law Commons](#)

Recommended Citation

Amy Wingfield, *The Opulent or the Oppressed? Expedited Removal as a Violation of the American Ideal*, 30 J. Nat'l Ass'n Admin. L. Judiciary Iss. 2 (2010)

Available at: <https://digitalcommons.pepperdine.edu/naalj/vol30/iss2/7>

This Comment is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Journal of the National Association of Administrative Law Judiciary by an authorized editor of Pepperdine Digital Commons. For more information, please contact bailey.berry@pepperdine.edu.

The Opulent or the Oppressed? Expedited Removal as a Violation of the American Ideal

By Amy Wingfield*

“. . . the bosom of America is open to receive not only the Opulent and respectable Stranger, but the oppressed and persecuted of all Nations and religions.”¹ – George Washington

I. INTRODUCTION

In November of 2000, a cattle farmer from Colombia flew to the United States and arrived at Miami International Airport.² Mr. Libardo Yepes carried an invalid visa, but he told officials at the airport that he feared for his life if he was returned to Columbia, where at least six relatives had been killed or kidnapped by rival

*Amy Wingfield is a third year student at Pepperdine University School of Law. Amy graduated from the University of Louisville with a Bachelor of Science in Justice Administration. She would like to thank her family and friends for their support and encouragement throughout law school, as well as the NAALJ staff and editors for their hard work and assistance. This article is dedicated to her mom, dad, and brother for being there to listen to each frustration and celebrate each success.

¹ 27 Writings of George Washington 254, *To The Members Of The Volunteer Association And Other Inhabitants Of The Kingdom Of Ireland Who Have Lately Arrived In The City Of New York* (John C. Fitzpatrick ed.), available at <http://etext.virginia.edu/etcbin/toccer-new2?id=WasFi27.xml&images=images/modeng&data=/texts/english/modeng/parsed&tag=public&part=280&division=div1>.

² Eric Schmitt, *When Asylum Requests Are Overlooked*, N.Y. TIMES, Aug. 15, 2001, A16, available at <http://www.nytimes.com/2001/08/15/us/when-asylum-requests-are-overlooked.html>.

factions.³ Yepes was deported within 24 hours.⁴ When Yepes fled Colombia again, this time arriving in Texas, he was seized and held in federal detention awaiting permanent removal.⁵ In an interview, Yepes said, “I asked for protection because I was very afraid of going back to my country.”⁶

Yepes was removed from the country through a process called expedited removal.⁷ Prior to the implementation of expedited removal statutes, only an immigration judge could determine the deportation of an arriving alien.⁸ Now, untrained Customs and Border Patrol (CBP) officers can order a person removed.⁹ U.S. immigration law provides,

If an immigration officer determines that an alien who is arriving in the U.S. ... is inadmissible under 1182(a)(6)(C) or 1182(a)(7), the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates

³ *Id.* Yepes lived in a province outside Medellin in Colombia. *Id.* The area was a “hotbed of violence” between leftist guerillas and their rival right-wing group. *Id.* The guerillas forced Yepes to pay \$250 per month at threat of violence. *Id.* The situation left Yepes in a difficult position between the two rival groups, with the leftist guerillas extorting money and the right-wing group threatening him with violence for paying the fees. *Id.* At one point, right-wing paramilitary shot at him and threatened to kill him. SCHMITT, *supra* note 2. The violence in Columbia has forced many to flee the country and seek asylum. *Id.*

⁴ *Id.*

⁵ *Id.* During the mandatory detention, Yepes was housed in a high-security compound with over 600 other detainees. *Id.* Many of these detainees were criminals. *Id.* Yepes earned one dollar a day sweeping the floors of the dormitory. SCHMITT, *supra* note 2. Yepes was able to purchase five dollar phone cards, each of which allowed him a four-minute conversation with his family in Colombia. *Id.* Eventually, Yepes was able to speak to an asylum officer, and his case was referred to an asylum judge. *Id.*

⁶ *Id.* Yepes’ case drew the attention of some concerned politicians. *Id.* Senator Patrick Leahy encouraged a bill that would eliminate expedited removal. *Id.* The bill was, of course, unsuccessful. SCHMITT, *supra* note 2. Thankfully, through the diligent work of pro bono representation, Yepes was able to win his hearing before the immigration judge. *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

either an intention to apply for asylum under section 1158 of this title or a fear of persecution.¹⁰

Aliens can be deemed inadmissible by fraudulently or willfully representing material facts to procure a visa or other admission documents,¹¹ by arriving in the United States without a valid unexpired visa, reentry permit, border crossing identification card or other entry document, or by using a visa that has been issued without compliance.¹²

The expedited removal statutes were enacted in 1996.¹³ Since these statutes' inception, human rights advocates have been critical of the expedited removal statutes, calling the policy failed, at best, and a violation of human rights, at worst.¹⁴ The motivation behind expedited removal – a desire to cut down on fraudulent entry into the United States, particularly for reasons of gaining employment – is understandable and laudable; however, the methods of the process are questionable. This comment explores the process of expedited removal as it violates the American Ideal. Part One provides an overview of international asylum and refugee law.¹⁵ Part Two explores U.S. asylum law and its history.¹⁶ Part Three describes the rationale, mechanics, process, and statistics of expedited removal.¹⁷ Part Four explains how these processes violate the American Ideal by depriving asylum seekers of due process, violating international norms, and affecting the perception of the United States throughout

¹⁰ Immigration and Nationality Act, 8 U.S.C. § 1225(b)(1)(A)(i) (2006).

¹¹ Immigration and Nationality Act, 8 U.S.C. § 216(a)(6)(C) (2006).

¹² Immigration and Nationality Act, 8 U.S.C. § 1182(7)(a)(i)(I-II) (2006).

¹³ See Immigration and Nationality Act, 8 U.S.C. §§ 1225(b)(2)(A)(i), 1182(7)(a)(i)(I-II) (2006).

¹⁴ Michael Welch, *DETAINED: IMMIGRATION LAWS AND THE EXPANDING I.N.S. JAIL COMPLEX*, p. 86-87 (Temple University Press, 2002) (quoting ACLU 1999b:1). "In practice, the expedited removal system operates in secrecy and erects an unprecedented barrier to the asylum process. . . . Problems of interpretation, legal understanding, fear, humility, and confusion all conspire to render this process discriminatory at best and meaningless at worst."

¹⁵ See *infra* notes 21-42 and accompanying text.

¹⁶ See *infra* notes 43- 71 and accompanying text.

¹⁷ See *infra* notes 72-108 and accompanying text.

the world.¹⁸ Part V provides suggestions for improving on the asylum policy,¹⁹ and Part VI concludes the comment.²⁰

II. PART ONE: OVERVIEW OF INTERNATIONAL ASYLUM & REFUGEE LAW

The refugee problem came to the forefront of international attention following World War II, when many people were displaced and in need of protection.²¹ Prior to 1951, there was no uniform system or instrument defining refugees and providing methods for

¹⁸ See *infra* notes 109- 191 and accompanying text.

¹⁹ See *infra* notes 192-204 and accompanying text.

²⁰ See *infra* note 205 and accompanying text.

²¹ UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES B(5) (1979) (reedited 1992) [hereinafter UNHCR HANDBOOK]. Nazi Germany created a refugee crisis the world was unprepared to deal with. UNITED STATES HOLOCAUST MEMORIAL MUSEUM, "Refugees," *Holocaust Encyclopedia*, available at <http://www.ushmm.org/wlc/article.php?lang=en&ModuleId=10005139> (last visited Nov. 6, 2010). From the period between 1933, when the Nazis first took power, and 1945, when the Nazis surrendered, 340,000 Jews fled Nazi-controlled Germany and Austria. *Id.* The Nazis continued to conquer countries in Europe and 100,000 of those refugees were deported and generally killed in concentration camps. *Id.* The *Kristallnacht* attacks in 1938 spurred further movement out of Nazi territories, and approximately 85,000 Jewish refugees fled to the United States from 1938 to 1939. *Id.* Unfortunately, the United States was unprepared (and likely unwilling) to aid many of these, with immigration quotas capped at 27,000 visas. *Id.* This created a worldwide crisis, with numbers rising to over 300,000 persons seeking refuge and with a very limited number of countries willing to provide protection. *Id.* The Evian Conference of 1938 did little good, and the Dominican Republic was the only country to promise aid to a large number of refugees. *Id.* Other countries of refuge were Palestine, which accepted over 60,000 German Jews, and Switzerland, which accepted 30,000 Jews but still turned as many back. UNITED STATES HOLOCAUST MEMORIAL MUSEUM, *supra* note 21. Following the war, hundreds of thousands of war survivors were displaced, left homeless, their assets destroyed. *Id.* These displaced persons were sheltered in camps in Germany, Austria, and Italy. *Id.* The immigration quotas of many countries and the unwillingness to accept immigrants demonstrated the need for a worldwide reform. The hundreds of thousands of displaced persons required international attention, and it was out of this international crisis that modern refugee law was birthed.

dealing with these displaced peoples.²² In July of 1951, the Convention Relating to the Status of Refugees was adopted, and in 1954, the Convention was put into force.²³ According to the Convention, a refugee was a person who,

As a result of events occurring before 1 January 1951 and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.²⁴

When the Protocol was adopted in 1967, the portion of the definition limiting refugees to those affected by events prior to 1951 was eliminated.²⁵ The Convention and Protocol are the mainstay of international refugee law, and a total of 110 countries are party to

²² UNHCR HANDBOOK, *supra* note 21, at B(5).

²³ *Id.*

²⁴ CONVENTION RELATING TO THE STATUS OF REFUGEES, UNHCR, art. I (A)(2), July 28, 1951 [hereinafter UNHCR CONVENTION].

²⁵ PROTOCOL RELATING TO THE STATUS OF REFUGEES, UNHCR, art. I(2), Jan. 31, 1967 [hereinafter UNHCR PROTOCOL].

either one or both of the agreements.²⁶ These two agreements provide the legal definitions of who can and cannot qualify as a refugee, the rights and duties that should be provided to refugees, and provisions regarding the diplomatic concerns of implementing the Convention and Protocol.²⁷

Though each country sets and maintains its own policies and procedures regarding asylum, the Convention and Protocol establish the basic rights that should be afforded to asylum-seekers, and there are several important provisions specifically enumerated by the Office of the United Nations High Commissioner for Refugees which are deemed “fundamental.”²⁸ These two provisions are the definition of a refugee, found above, and the principle of *non-refoulement*.²⁹

Non-refoulement is a basic principle of refugee law, and according to the terms of the Convention, prohibits a Contracting State from returning a refugee to a territory where life or freedom may be threatened on account of race, religion, nationality,

²⁶ UNHCR HANDBOOK, *supra* note 21, at C(11). These countries include Algeria, Gabon, Nigeria, Rwanda, Botswana, Kenya, Senegal, Cameroon, Sierra Leone, Somalia, Liberia, Sudan, Chad, Togo, Tunisia, Mali, Malawi, Tunisia, Egypt, Morocco, Ethiopia, Mozambique, Zaire, Zambia, Zimbabwe, Argentina, and Dominican Republic. Panama, Belize, Ecuador, Paraguay, Bolivia, El Salvador, Peru, Brazil, Haiti, Nicaragua, Chile, Colombia, Canada, United States, China, Israel, Iran, Japan, Yemen, Austria, Poland, Iceland, Portugal, Romania, Italy, Sweden, Switzerland, France, United Kingdom, Greece, Australia, New Zealand, and New Guinea (non-exhaustive list). *Id.* Countries that are party only to the Convention are Samoa, Monaco, and Madagascar. *Id.* The countries party only to the Protocol are Venezuela, the U.S., Swaziland, and Cape Verde. *Id.* Notably missing from the list are countries such as Iraq, India, Saudi Arabia, and Cuba. *Id.* Malta and Turkey still apply the Convention’s geographical limitations and accept refugees only from Europe, while other nation states have adopted the Protocol’s non-geographical approach. *Id.*

²⁷ UNHCR HANDBOOK, *supra* note 21, at D(12)(i)-(iii). The Handbook (and the Convention and Protocol) does not handle questions relating to the granting or denial of asylum to refugees, and this is left up to individual nations who ratify the agreements. *Id.* at G(24).

²⁸ UNHCR CONVENTION, *supra* note 24, Introductory Note by the Office of the United Nations High Commissioner for Refugees (UNHCR). UNHCR finds these provisions so important to the rights of refugees that State Parties to the treaties may not make any reservations which may abridge the rights provided. *Id.*

²⁹ *Id.*

membership of a particular social group, or political opinion.³⁰ Though this principle is of utmost importance to international asylum and refugee law, there are exceptions to *non-refoulement*, and these exceptions have helped open the door for the process of expedited removal. An asylum-seeker may not claim the benefits of *non-refoulement* if there is a reasonable ground for believing the person may be dangerous to the security of a country (the national security exception), or if he or she has been convicted of a particularly serious crime that could make the individual dangerous to the community.³¹

Besides providing for the immediate protection of refugees, the Protocol and Convention also describe the rights that should be given to a refugee after he or she has been granted asylum in a new country.³² Provisions such as *non-refoulement* ensure that the alien will not be sent back to a dangerous country to be persecuted, but the Convention and Protocol go beyond the basic safety rights of the refugee and seek to establish secondary rights that allow the refugee to resettle.³³ The numerous provisions of the Convention and Protocol are beyond the scope of this article, but an overview of the basic rights afforded to refugees is beneficial to an understanding of the goals of international asylum law.

Of particular note in these provisions to refugees is language that can be found, for example, in Article 4, which provides, “The Contracting States shall accord to refugees within their territories treatment at least as favorable as that accorded to their nationals with

³⁰ UNHCR CONVENTION, *supra* note 24, at art. 33(1). These are the same factors that were established in the definition of a refugee, and they will hereinafter be referred to as the “five factors.”

³¹ UNHCR CONVENTION, *supra* note 24, at art. 33(2). The full jurisprudence regarding what constitutes a particularly serious crime or a danger to the community is beyond the scope of this comment. In the United States, the principle of *non-refoulement* is covered by asylum’s predecessor, withholding of removal. Immigration and Nationality Act, 8 U.S.C. §§ 243(h), 241(b)(3) (2006). Withholding of removal carries the same exceptions, and the Circuit Courts are divided on the standards that should be applied when determining seriousness of a crime and danger to the community. *See, e.g., Delgado v. Holder*, 563 F.3d 863, 867 (9th Cir. 2009) (“Two other circuits, which addressed the issue before the BIA weighed in with a precedential opinion, reached opposite results.”).

³² *See generally* UNHCR CONVENTION, *supra* note 24.

³³ *See* UNHCR CONVENTION, *supra* note 24, at art. 12-34.

respect to freedom to practice their religion and freedom”³⁴ Another Article provides that refugees shall be afforded treatment “not less favourable than that accorded to aliens generally in the same circumstances.”³⁵ It can be inferred, then, that these provisions seek to prevent countries from discriminating against aliens on account of refugee status. A refugee must be either afforded the same treatment as a national or as an alien in similar circumstances; there can be no singling out of the refugee for different treatment. Another important provision afforded to refugees is that for wage-earning employment.³⁶ This is particularly vital for refugees, as it enables them to begin a new life in a new country. Finally, the Convention and Protocol note that Contracting States must give “sympathetic consideration” to the issue of travel documents to refugees.³⁷ This is especially pertinent to the issue of expedited removal, which, as noted, allows aliens to be removed quickly because of a lack of valid travel documents. The Convention notes that refugees may have been unable to obtain travel documents from their own countries, and therefore, the hosting country should issue refugees travel documents to allow them to travel outside the territory.³⁸ The Convention directly addresses this need, and it appears the United States has failed to provide the sympathetic consideration urged by UNHCR.

The Protocol and Convention are the primary sources of international asylum law, but they are not the only sources. Refugee law falls under three main categories of law: (1) customs; (2) treaties;

³⁴ UNHCR CONVENTION, *supra* note 24, at art. 4. Similar language can be found throughout the Convention, including Article 7 and Article 14.

³⁵ *Id.* at art. 13. This Article relates to the acquisition of movable and immovable property. *Id.*

³⁶ *Id.* at art. 17. The right to wage-earning employment is meant to be as favorable as the treatment afforded to nationals of a foreign country. *Id.*

³⁷ *Id.* at art. 28.

³⁸ UNHCR CONVENTION, *supra* note 24, at art. 28. This concern over the travel documents needed for refugees contradicts the U.S. policy of punishing the asylum-seeker for not possessing the proper documents. *Id.* That the Convention directly addresses the need for such travel documentation acknowledges what the U.S. policy does not: that there are likely to be extenuating circumstances which render those most in need of protection unable to proper and legal methods of entering the country. *Id.*

and (3) general principles, or *jus cogens*.³⁹ Under the treaties category, there are many sources of positive law besides the Convention and Protocol, including the Convention Governing the Specific Aspects of Refugee Problems in Africa, the Cartagena Declaration, and the Guiding Principles on Internal Displacement.⁴⁰ In addition, many human rights treaties also apply to asylum law in the international community, including the Universal Declaration of Human Rights and the International Covenant on Economic, Social, and Cultural Rights.⁴¹ However, the majority of these treaties are non-self-executing, and therefore, even though countries may sign these documents, their signatures are largely symbolic and are in effect useless at the domestic level until the countries have enacted

³⁹ Statute of the International Court of Justice Art. 38(1). The statute provides,

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Id. As this is the International Court of Justice (ICJ), this statute applies to all international law, and these three main categories apply not only to asylum and refugee issues but to all international matters.

⁴⁰ FORCED MIGRATION ONLINE, *Introduction*, <http://www.forcedmigration.org/guides/fmo038/> (last visited Nov. 6, 2010). The Guiding Principles on Internal Displacement, promulgated by the United Nations Office for the Coordination of Humanitarian Affairs, are simply that, guiding principles, and have not reached the level of a treaty.

⁴¹ *Id.*

implementing legislation.⁴² Therefore, the most important source of refugee law for purposes of considering expedited removal is U.S. asylum law, though it must necessarily be analyzed through the lens of the international standards provided for in treaties, custom, and general principles of law.

III. PART TWO: REFUGEES IN AMERICA

As the George Washington quote expresses, America has since its inception at least aspired to be a beacon to the oppressed and persecuted of the world.⁴³ The American Ideal has long stood for achieving success regardless of circumstances.⁴⁴ Robert Kennedy viewed this ideal as intertwined with attitudes towards immigration, stating that, “We have always believed it possible for men and women who start at the bottom to rise as far as their talent and energy allow. Neither race nor place of birth should affect their chances.”⁴⁵ There are numerous examples of our nation portrayed as a “safe haven” spread throughout culture, from the words mounted in the

⁴² See generally Kenneth Roth, *The Charade of U.S. Ratification of International Human Rights Treaties*, 1 CHI. J. INT’L L. 347, 348-49 (2000). Roth is the Executive Director of Human Rights Watch (HRW), and takes a critical look at the U.S. methods of treaty ratification, stating that it is basically a type of “insurance policy” against mistakes in the treaties. *Id.* at 347-48. By signing these non-self-executing treaties, the United States gives these treaties no domestic effect until legislation is passed which implements the provisions of the document. *Id.* at 349. Roth points out that this in many ways makes sense, as it ensures that new rights are endorsed by the full Congress. *Id.* However, Congress sometimes chooses not to enact implementing legislation because the rights were already protected by law. *Id.* Thus, no cause of action can exist under the treaty. *Id.*

⁴³ WRITINGS OF GEORGE WASHINGTON, *supra* note 1.

⁴⁴ See Jim Cullen, *THE AMERICAN DREAM: A SHORT HISTORY OF AN IDEA THAT SHAPED A NATION*, p. 60 (Oxford University Press, 2003).

⁴⁵ Robert Kennedy, *Introduction*, in JOHN F. KENNEDY, *A NATION OF IMMIGRANTS* ix, x (Harper & Row, Publishers, 1964).

Statue of Liberty⁴⁶ to the ubiquitous reference to the “melting pot” of America.⁴⁷

In fact, statistics show that America does have a rich history of providing protection for refugees. Since 1975, more than 2.6 million refugees have been firmly resettled in the United States.⁴⁸ The highest number of refugees resettled was 207,000 in 1980, with a low of 27,110 in 2002.⁴⁹ In the dawning era of refugee protection in the years following World War II, the United States was a leader in refugee and human rights. The United States admitted 350,000 people who were displaced by the war, led efforts to establish the United Nations, and contributed to the development of a universal recognition of human rights.⁵⁰ When the UNHCR Convention and Protocol were created, the United States signed on to these

⁴⁶ The familiar words, “Give me your tired, your poor, Your huddled masses yearning to breathe free, The wretched refuse of your teeming shore,” come from the poem “The New Colossus” by Emma Lazarus. Emma Lazarus, “The New Colossus” (1883), available at <http://xroads.virginia.edu/~CAP/LIBERTY/lazarus.html>. The last five lines of the poem are found on the Statue of Liberty, and the full inscription reads,

“Give me your tired, your poor,
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shore,
Send these, the homeless, tempest-tossed to me,
I lift my lamp beside the golden door!”

Id.

⁴⁷ The exact origins of the metaphor of the melting pot are unknown, but the term was popularized by a play by Israel Zangwill written in 1908 and titled *The Melting Pot*. Professor Meri-Jane Rochelson, *The Melting Pot: A Centennial Look Back at Israel Zangwill's Play*, UNIVERSITY OF WISCONSIN CENTER FOR JEWISH STUDIES, available at <http://jewishstudies.wisc.edu/lecture-archive/the-melting-pot-a-centennial-look-back-at-israel-zangwills-play/>.

⁴⁸ *History of the U.S. Refugee Resettlement Program*, REFUGEE COUNCIL USA, <http://www.rcusa.org/index.php?page=history> (last visited Dec. 20, 2010) (information provided by the Resettlement Section of UNHCR Regional Office Washington, D.C.).

⁴⁹ *A History of Refugee Protection*, HUMAN RIGHTS FIRST, available at http://www.humanrightsfirst.org/asylum/lifeline/pages.asp?country=us&id=6&misc1=facts_history. The trend of declining numbers of refugees is not accidental, and is likely due to policies like expedited removal.

⁵⁰ Theresa Sidebotham, *Immigration Policies and the War on Terrorism*, 32 DENV. J. INT'L L. & POL'Y 539, 543 (2004).

international treaties.⁵¹ Though the United States did not expressly ratify the concept of *non-refoulement*, the treaty provisions have been ratified through the asylum law and its predecessor, withholding of removal.⁵²

As the country has evolved, policy has as well. Concerns of national security have preempted concerns for the poor and oppressed of other nations, and though this is certainly understandable, it is beneficial to look at the evolution of immigration policy to fully understand the changes that have been implemented and how far America has strayed from its original ideas. During the 18th century, there were few restrictions imposed on immigration.⁵³ There was little opposition to immigrants who came to settle in the United States and a belief that most immigrants would be absorbed into the culture.⁵⁴ America itself was founded by immigrants, and in 1790, the year of the first census, 75% of the country was English, Scotch, or Scotch, or Scotch Irish.⁵⁵ Another eight percent were German, and the remaining population hailed

⁵¹ *Id.*

⁵² *Id.* A full treatment of withholding of removal is beyond the purposes of this article. All asylum applicants are automatically considered for withholding of removal, which provides that the aliens should not be removed to a country “where the alien’s life or freedom would be threatened.” 8 C.F.R. § 208.16 (2010). The burden of proof is higher for withholding than it is for asylum, and to be granted withholding, the alien must show by clear probability that he or she would be threatened (as opposed to the lesser burden well-founded fear of persecution under asylum). *Id.* Additionally, withholding provides less protection. *Id.* When an alien is granted withholding, the only restriction is that he or she cannot be removed to the country specified. *Id.* The statute does not provide for additional services or a path to citizenship as an asylee would receive. *Id.*

⁵³ Kathryn M. Bockley, *A Historical Overview of Refugee Legislation: The Deception of Foreign Policy in the Land of Promise*, 21 N.C. J. INT’L L. & COM. REG 253, 256 (1995).

⁵⁴ *Id.* That is not to say that there was no opposition to a large influx of immigrants into the country. *Id.* At the time, most immigrants were Protestant and English-speaking. *Id.* at 257. Public opinion began to change when more immigrants began to arrive from southern and eastern European countries. *Id.* However, it is most important to note that in its earliest days, America was much more receptive to receiving immigrants than it is today. *Id.*

⁵⁵ Senator Alan K. Simpson, *The Immigration Reform and Control Act: Immigration Policy and the National Interest*, 17 U. MICH. J.L. REFORM 147, 147 (1984).

from other European countries.⁵⁶ The very idea of the country was a “haven for the oppressed and those seeking freedom.”⁵⁷ The majority of American settlers fled European countries as a result of religious persecution.⁵⁸ As established above, persecution based on religious beliefs meets the five factors now defining a refugee.⁵⁹ Consequently, many of those early American settlers would today meet the statutory qualification of refugees. No clearer proposition exists to demonstrate the historical importance of the oppressed in America.

As the country grew and evolved, immigrants became essential to the idea of “manifest destiny.”⁶⁰ During the period of expansion from 1820 to 1880, “[t]he belief in America as a land of asylum for the oppressed was reinforced by the commitment to the philosophy of manifest destiny.”⁶¹ Immigrants in the country helped build railways, establish new states, and defend the boundaries of new states.⁶² Unfortunately, the end of manifest destiny began some of the earliest backlash and restrictions against immigrants.⁶³ When the need for expansion subsided, immigrants shifted into labor, inciting negative feelings towards some and a complaint heard largely today: that immigrants were deriving more benefits than deserved.⁶⁴ As a

⁵⁶ *Id.*

⁵⁷ *Id.* at 147-48.

⁵⁸ *Id.* at 148.

⁵⁹ See *supra* note 25 and accompanying text.

⁶⁰ SIMPSON, *supra* note 55, at 148.

⁶¹ *Id.* (quoting JOYCE VIALET, CONG. RESEARCH SERV., REP. No. 80-223 EPW, A BRIEF HISTORY OF U.S. IMMIGRATION POLICY 4, 7 (1980)).

⁶² Simpson, *supra* note 55, at 148.

⁶³ *Id.*

⁶⁴ *Id.* at 148-49. Americans in the early 1900s started to feel that immigrant labor lowered pay and working conditions of U.S. natives. *Id.* at 149. This attitude most likely began the continued animosity towards immigrant labor, and fear of immigrants began to rise. Some U.S. citizens started to fear that immigrants were associated with crime and poverty. *Id.* This, along with the nationalism that followed the first World War, began a new era of restrictionism. *Id.*

result of this new negativity, restrictions against immigrants were codified in the Immigration Act of 1917.⁶⁵

Following World War II and the human rights atrocities that ravaged Europe, worldwide attention soon turned to the problem of persons displaced by the war. America was at the forefront of the movement to provide humanitarian aid to these displaced persons, and more than 250,000 displaced Europeans were admitted to the United States following World War II.⁶⁶ The watershed legislation was the Displaced Persons Act (DPA) of 1948, which afforded rights to certain persons displaced by the persecution of Nazi Germany.⁶⁷ As previously noted, it was also the events of World War II that turned international attention to the refugee problem and led to the development of the United Nations High Commissioner for Refugees (UNHCR) Convention and Protocol.⁶⁸

The Convention did not provide specific methods for enforcement within the nation states who signed onto the treaty.⁶⁹ Therefore, the signatories must implement the provisions of the Convention through their own legislative processes. The United

⁶⁵ SIMPSON, *supra* note 55, at 149. The Immigration Act of 1917 codified already existing restrictions that barred entry of Orientals and established immigrants over the age of sixteen to pass literacy tests. *Id.* Over the next few years, more restrictions and quotas were established. *Id.*

⁶⁶ HISTORY OF THE U.S. REFUGEE RESETTLEMENT PROGRAM, *supra* note 48.

⁶⁷ *Id.* The Act was to “authorize for a limited period of time the admission into the United States of certain European displaced persons for permanent residence, and for other purposes.” Displaced Person Act of 1948, Pub. L. 80-774, 64 Stat. 869, 1009 (1948). The purpose of the Act was to help the victims of Nazi Persecution during World War II. Michelle Hinojosa, *Displaced Person Act of 1948*, U.S. IMMIGRATION ONLINE, http://library.uwb.edu/guides/USimmigration/1948_displaced_persons_act.html. Many people had fled their homes and could not return to their countries because of the fear of persecution. *Id.* Specifically, the DPA was concerned with those from Germany, Italy, Austria, the French sectors of Berlin and Vienna, American and British Zone of Czechoslovakia, and Czechoslovakian natives. *Id.* The DPA allowed these displaced persons to receive permanent residency and employment, to bring their families, and also provided for persons under the age of sixteen who were orphaned during the war. *Id.*

⁶⁸ See *supra* notes 25-28.

⁶⁹ See generally UNHCR CONVENTION AND PROTOCOL, *supra* notes 24-25.

States did this with the Refugee Act of 1980.⁷⁰ In the case of *INS v. Cardoza-Fonseca*, Justice Stevens wrote,

If one thing is clear from the legislative history of the new definition of ‘refugee,’ and indeed the entire 1980 Act, it is that one of Congress’ primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees.⁷¹

The purpose of the Refugee Act was to insure that the United States was living up to the international standards established by the UNHCR Convention and Protocol. The implementation of expedited removal puts this goal in jeopardy, and the remainder of this paper will focus on the policy of expedited removal and the problems it has created for the United States and the refugee community.

⁷⁰ Refugee Act of 1980, 8 U.S.C. § 1101 (1980), Pub. L. No. 96-212, 94 Stat. 102. The Act was reauthorized through 2002 in H.R. 3061. The Refugee Act, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR CHILDREN & FAMILIES, available at <http://www.acf.hhs.gov/programs/orr/policy/refact1.htm>. The Refugee Act additionally created The Federal Refugee Resettlement Program. *Id.* The Resettlement Program aids refugees in firm resettlement in the United States and helps them gain economic self-sufficiency. *Id.*

⁷¹ *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987). Cardoza-Fonseca was a Nicaraguan woman who entered the United States as a visitor. *Id.* at 424. She remained longer than she was permitted, and when she did not voluntarily leave the country, INS began removal proceedings. *Id.* Cardoza-Fonseca conceded that she was illegally in the country but requested withholding of removal and asylum. *Id.* Her brother had been tortured and imprisoned in Nicaragua, and she feared she would be persecuted on return. *Id.* The Immigration Judge applied a clear probability of persecution standard to both her withholding and asylum claims. *Id.* at 425. The Board of Immigration Appeals (BIA) affirmed the decision, and the 9th Circuit did not challenge the decision. *Cardoza-Fonseca*, 480 U.S. at 435. Cardoza-Fonseca contended that the standard should instead be “well-founded fear.” *Id.* The Convention and Protocol provided that a refugee was one who had a well-founded fear of persecution. *Id.* at 437. Therefore, the Court held that it was appropriate to look to the Convention and Protocol to determine the meaning of this phrase. *Id.*

IV. PART THREE: EXPEDITED REMOVAL

For a country essentially established by refugees and with a rich history of providing for the oppressed of the world, it can, at first blush, appear surprising that such harsh policies have been enacted in recent years. However, as the history shows, changing attitudes towards immigration have come with significant change in the United States. In the country's early years, concerns about jobs and poverty increased awareness of and hostility towards immigrants.⁷² It is certainly understandable that tragic events costing hundreds or thousands of lives will prompt rapid and radical change in immigration policy of the United States. With current threats to nations around the globe, it is necessary for all countries to focus on national security concerns. A policy like expedited removal, which heightens efficiency and strives to eliminate potential risks to national security, is an attractive idea. In the current economic crisis, our leaders must also make a critical examination of the costs involved with providing for refugees and providing more extensive processes to determine asylum eligibility.

As two writers appropriately note, "speed will always be at war with accuracy."⁷³ Concerns with efficiency, economics, and national security necessarily conflict with the fairness afforded to those seeking protection. The severe consequences of potentially erroneous determinations, ranging from imprisonment to death, demand the decision-making process be made with the smallest degree of error possible.⁷⁴ The expedited removal process was enacted in 1996, prior to the terrorist attacks of September 11, 2001.⁷⁵ Though some have criticized expedited removal and determined the only appropriate solution is repeal of the law, the September 11th attacks and resulting emphasis on national security

⁷² See *supra* notes 63-64 and accompanying text.

⁷³ Michele R. Pistone & John J. Hoeffner, *Rules Are Made to Be Broken: How the Process of Expedited Removal Fails Asylum Seekers*, 20 GEO. WASH. IMMIGR. L.J. 167, 171 (2006).

⁷⁴ See generally *id.*

⁷⁵ *Id.* at 167. The power originally fell under the jurisdiction of the Immigration and Naturalization Service (INS). *Id.* The INS has since been replaced by Customs and Border Protection (CBP) under the Department of Homeland Security (DHS). *Id.*

make it doubtful that such extreme measures will be taken in the near future.⁷⁶

Though the expedited removal statute was not enacted until 1996, the idea was first proposed in the 1980s.⁷⁷ A massive influx of immigrants from Haiti and Cuba provided the impetus for policy makers to institute new procedures to deal with these arriving aliens in a prompt and effective manner.⁷⁸ Expedited removal was proposed again during the 103rd Congress.⁷⁹ The House initially took no action, but during the 104th Congress, the House passed a version of the bill.⁸⁰ The final version of expedited removal is found

⁷⁶ *Id.* at 170, 197.

In formulating our suggested reforms, we must appreciate the overwhelming reality that the culture in which expedited removal occurs is an enforcement culture, meaning that CBP (as well as its parent department, DHS) focuses on enforcing the rules restricting illegal immigration, as opposed to maximizing legal immigration or providing services to immigrants and potential immigrants. By its nature, especially after the events of September 11, 2001, this culture will resist initiatives that are perceived as failing to serve the enforcement mission.

PISTONE & HOFFNER at 196-97.

⁷⁷ ALISON SISKIN & RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL 33109, IMMIGRATION POLICY ON EXPEDITED REMOVAL OF ALIENS 1, 3 (2005) [hereinafter CRS REP.]. When the policy was first proposed, it was called “summary exclusion.” *Id.*

⁷⁸ *Id.* Due to political conditions in Haiti and Cuba during the early 1980s, as well as the economic conditions in both countries, 125,000 Cubans and 30,000 fled to South Florida. *Id.* This was called the Mariel boatlift and lasted several months. *Id.* At the time of the Mariel boatlift, arriving aliens were entitled to a hearing before an immigration judge. *Id.* If denied, the alien was entitled to administrative or judicial review. CRS REP., *supra* note 77, at 3. By implementing summary exclusion, legislators hoped to restrict unauthorized entry into the United States by shortening the process and denying a hearing, review, and appeal to aliens who arrived without the necessary travel documents. *Id.* Interestingly, summary exclusion was written into the Immigration Reform and Control Act of 1986, but it was deleted before the legislation was enacted. *Id.*

⁷⁹ *Id.* The Clinton Administration sought to enact summary exclusion “to target the perceived abuses of the asylum process by restricting the hearing, review, and appeal process for aliens at the port of entry.” *Id.*

⁸⁰ *Id.* This was initially called the Immigration in the National Interest Act of 1995, but it would become the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. CRS REP., *supra* note 77, at 3.

in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which authorizes summary removal of immigrants with fraudulent documentation.⁸¹ The issue of fraudulent documentation is controversial, at best, as honest asylum seekers often carry fraudulent documentation because they have no other choice.⁸² The alien is thus caught in a difficult situation: the falsified travel documents may have been the only means of escaping the country of persecution, but using such documents may lead to additional problems and even return to the country of persecution upon arrival in the United States. The consequences of being caught with fraudulent documentation are swift and severe – the inspection officer, untrained in asylum law, can immediately deny the alien entry and place them on the next plane bound for their home country or country of last habitual residence.⁸³

The process of expedited removal can begin and end with a Customs and Border Patrol (CBP) inspector at the port of entry.⁸⁴ Although these inspectors are untrained in the delicate matters of asylum law, they are the first to confront the alien and the first gate

⁸¹ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, Div. C, 110 Stat. 3009-546 (1996) [hereinafter IIRIRA].

⁸² James E. Crowe, *Running Afoul of the Principle of Non-refoulement: Expedited Removal Under the Illegal Immigration Reform and Immigrant Responsibility Act*, 18 ST. LOUIS U. PUB. L. REV. 291, 296 (1999). The author points out that expedited removal occurs when applicants lack the requisite documentation or have obtained documentation fraudulently. *Id.* However, this does not account for the circumstances from which the alien has fled. *Id.* “[T]he circumstances surrounding the departure of many would-be asylum seekers from their country of origin are such that they may not have been able to acquire the proper documents for admission to the U.S.” *Id.* This is the tragic irony of expedited removal. Those who need protection the most are those most likely to be subject to expedited removal proceedings. The documents which may have been the alien’s only method of escape from persecution are the same documents that may send the alien back without a hearing. *Id.*; see also PISTONE & HOFFNER, *supra* note 73, at 174. According to Pistone and Hoeffner, it could even be dangerous for asylum seekers to carry documents which may identify them to the government officials who persecute them. PISTONE & HOFFNER, *supra* note 73, at 174. Additionally, if the persecution the asylum seeker is trying to avoid is imminent in nature, he or she may not have had the time needed to gather these important documents. *Id.*

⁸³ CROWE, *supra* note 82, at 292.

⁸⁴ See generally *id.*; see also PISTONE & HOFFNER, *supra* note 73.

through which the alien must pass.⁸⁵ This first tier of the process is dependent upon travel documents, and it is at this stage that the alien must present passports, visas, or other travel documentation.⁸⁶ If the alien possesses no travel documents or is caught with falsified documents, the alien *must* state that he or she is seeking asylum or that he or she possesses a fear of being returned to the home country or country of last habitual residence.⁸⁷ This, on its face, seems unfair, and very likely is. The alien may not have even had access to valid travel documentation, and it follows that the alien may not have had access to information regarding asylum eligibility and procedure.⁸⁸ Without any awareness of this mandatory statement of fear or intention to seek asylum, the alien can immediately be returned to the country where he or she has been or will be persecuted.

Although the lack of training and lack of information are valid concerns at this stage of the expedited removal process, it appears that the most substantial violations occur later in the process, as most arriving aliens do continue past the primary inspection.⁸⁹

The secondary inspection is where the alien is at the highest level of risk. This interview generally lasts about one hour, and the alien must answer questions without aid from family, friends, or attorneys.⁹⁰ Even more alarming than the lack of assistance available

⁸⁵ CROWE, *supra* note 82, at 293.

⁸⁶ PISTONE & HOEFFNER, *supra* note 73, at 172.

⁸⁷ CROWE, *supra* note 82, at 293. Crowe further demonstrates that the alien must satisfy the “credible fear” requirement to the INS inspector. *Id.* at 292. This article was written prior to the dissolution of the INS following the establishment of the Department of Homeland Security, and INS inspectors are now replaced by CBP officers. *Id.* This is problematic for many reasons, but Crowe exhibits particular concern over the lack of training of these inspectors, pointing out that they are “often overworked and largely untrained in asylum law.” *Id.*

⁸⁸ See *infra* notes 193-94 and accompanying text for further discussion.

⁸⁹ PISTONE & HOEFFNER, *supra* note 73, at 172. The primary inspection process applies to all persons entering the United States across borders, through airports, and by arrival by ship. *Id.* Most people are able to pass easily through this initial inspection, and roughly 300 million applicants are processed each year. *Id.* Even those thought to be ineligible are generally referred to secondary inspection, although there is the remote possibility that the CBP inspector will determine that there is no credible fear and return the alien without a secondary inspection. *Id.*; see also CROWE, *supra* note 77, at 304.

⁹⁰ PISTONE & HOEFFNER, *supra* note 73, at 173.

to the alien are the harsh conditions under which this interview can take place. Without any legal rights to due process at this time, there is no guarantee that the alien will be seen rapidly, and those who are not immediately taken to an interview can be handcuffed or shackled until an inspector is available to begin the interview.⁹¹ During this interview, it is crucial for the alien to express the intention to apply for asylum or some fear of persecution. The alien will be questioned about the fear stated, and during this phase, the inspector is required to follow certain mandatory guidelines meant to protect the alien from being wrongly removed from the country.⁹² These mandatory provisions include informing the alien of rights, protections, and the nature of the proceedings.⁹³ Additionally, the inspector must ask a list of questions which are meant to elicit information about the potential asylum claim.⁹⁴ There are three possibilities for the alien following this secondary inspection: grant of admission to the country, denial of admission, or a credible fear interview.⁹⁵ If the alien is denied a credible fear interview, the secondary inspector needs only to acquire a supervisor's approval of a removal order before the alien can be deported.⁹⁶ Courts are forbidden from reviewing the decisions of these secondary inspectors and their supervisors.⁹⁷ Therefore, the decision is final, and the judgment is immediate.

If, on the other hand, the alien is determined by the secondary inspector to have a potentially valid asylum claim, the process will continue to the third phase, the credible fear assessment.⁹⁸ However, the referral is not immediate. The alien will first be placed in a detention center, where he or she will await the credible fear interview.⁹⁹ This portion of the process is yet another problematic

⁹¹ *Id.*

⁹² *Id.* at 175. More detail on these mandatory provisions and the failure to abide by them will be discussed in the proceeding section. *See infra* notes 122-30 and accompanying text.

⁹³ PISTONE & HOFFNER, *supra* note 73, at 175.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 173-74.

⁹⁷ *Id.* at 174.

⁹⁸ *Id.* at 174-75.

⁹⁹ *See generally* PISTONE & HOFFNER, *supra* note 73, at 174.

aspect of the expedited removal process. While awaiting the interview with an asylum officer, the alien is placed in mandatory detention, frequently with aliens who have committed criminal activity.¹⁰⁰ With the backlog of cases and the number of applicants, it is understandable that some arriving aliens are not seen immediately, and it is further understandable that DHS would seek to exercise control over these individuals who may still represent a threat and have not yet been proven credible asylum applicants. However, the detention is indefinite, and as the case of Libardo Yepes demonstrated, innocent people have suffered under this mandatory detention. The inherent unfairness of this detention will be discussed further in the subsequent section.¹⁰¹

To fully comprehend the difficulties inherent in the expedited removal statutes and procedures, we must examine the frequency of these removals in comparison to successful asylum applicants. Unfortunately, there is little way to determine whether the removal was appropriate, and thus the figures are not truly representative of any injustice in the system. Because there is no ability for judicial review, once an alien is removed through the expedited removal process, there is no follow-up to determine what happens post-expulsion. The numbers are still striking, however, and worth some consideration.

In 2008, 60,108 persons were admitted as refugees in the United States.¹⁰² Furthermore, 22,930 person were granted asylum.¹⁰³ There are two methods by which an individual can achieve asylum under U.S. law: affirmative applications and defensive

¹⁰⁰ CRS REP., *supra* note 77, at 12.

¹⁰¹ SCHMITT, *supra* note 1.

¹⁰² Daniel C. Martin & Michael Hoefler, DHS ANN. FLOW REP., *Refugees and Asylees: 2008*, DEP'T OF HOMELAND SEC., (June 2009), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_rfa_fr_2008.pdf. The predominant countries represented by these refugees were Burma, Iraq, and Bhutan. *Id.*

¹⁰³ *Id.*

proceedings.¹⁰⁴ In 2008, 12,187 affirmative applications ended in grants of asylum, and 10,743 defensive applicants successfully claimed asylum.¹⁰⁵ Turning to expedited removal, a total of 113,500 individuals were deported through expedited removal in 2008, a figure that represents nearly five times the number of asylum grants in the same year.¹⁰⁶ Expedited removal accounted for 32% of all removals.¹⁰⁷ The number of removals increased 12% from 2007 to 2008, and expedited removal rose 7% from the previous year.¹⁰⁸

¹⁰⁴ *Obtaining Asylum in the United States: Two Paths*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (USCIS), www.uscis.gov (last visited Nov. 17, 2010). Affirmative applications are brought by individuals who have already entered the United States and have submitted the appropriate form (Form I-589 – Application for Asylum and for Withholding of Removal). *Id.* Generally, the affirmative application must be filed with USCIS within one year of the alien's arrival in the United States, although this one-year rule can be waived if the individual is able to demonstrate exceptional circumstances or changed circumstances in the country that affected the eligibility status. *Id.* The alien is then interviewed and the case is decided. *Id.* On the other hand, defensive applications arise when the government initiates a removal proceeding against the alien and the alien then seeks asylum as a defense to removal. *Id.* Defensive applications are handled through immigration judges under the Executive Office for Immigration Review (EOIR). *Id.* The government is represented through Immigrations and Customs Enforcement (ICE) attorneys, and the immigration judge makes the determination on the applicant's refugee status. *Id.*

¹⁰⁵ DHS ANN. FLOW REP., *supra* note 102. The leading representative countries for grants of asylum were China, Colombia, and Haiti. *Id.*

¹⁰⁶ DHS ANN. FLOW REP., *Immigration Enforcement Actions: 2008*, DEP'T OF HOMELAND SEC., (July 2009), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_08.pdf.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* The major countries represented in expedited removal proceedings included Mexico, Guatemala, Honduras, El Salvador, Brazil, and Ecuador. *Id.* It may be interesting to consider the country of origin and its effect on whether the alien is removed or granted asylum, since primarily individuals from Latin American countries were subjected to expedited removal proceedings. *Id.* United States foreign policy does, unfortunately, have a history of discrimination in its protective measures, as demonstrated by the pattern of Haitian interdiction beginning in the 1980s, as contrasted by a more open attitude towards Cuban refugees. *Discrimination Against Haitian Asylum Seekers, Appendix B to Rights of Immigrants in and Migrants to the United States*, U.S. HUMAN RIGHTS NETWORK, available at http://www.ushrnetwork.org/files/ushrn/images/linkfiles/CERD/2bHaitian_Asylum_Seekers.pdf.

Again, there is no way to determine which, if any, of these removals resulted in the return of worthy asylum applicants to a country where they have been or will be persecuted. However, the rising number of individuals subjected to expedited removal and the disproportionate number of removals in comparison to asylum grants suggests that errors can and do occur.

V. PART FOUR: EXPEDITED REMOVAL AS A VIOLATION OF THE AMERICAN IDEAL

In 2008, a substantial 60,108 refugees arrived in the United States.¹⁰⁹ This number was an increase from 2007, when a total of 48,217 refugees were admitted.¹¹⁰ From 2007 to 2008, there was a massive surge of Iraqi refugees fleeing the country, which helped account for the large influx of refugees in 2008.¹¹¹ They fled their home countries and sought protection in the United States, but they found something very different. In a survey of detainees awaiting expedited removal proceedings, one refugee said, in response to detention conditions, "I fled my country because of this. I broke

¹⁰⁹ *Yearbook of Immigration Statistics: 2008*, DEPARTMENT OF HOMELAND SEC., available at <http://www.dhs.gov/files/statistics/publications/YrBk08RA.shtm>.

¹¹⁰ DHS ANN. FLOW REP., *Refugees and Asylees: 2007*, DEPARTMENT OF HOMELAND SEC., available at http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_rfa_fr_2007.pdf

¹¹¹ *Spotlight on Refugees and Asylees in the United States*, MIGRATION INFORMATION SOURCE, available at <http://www.migrationinformation.org/USfocus/display.cfm?id=734#5>. In 2007, 1,608 refugees were admitted from Iraq, constituting only 3.3% of the refugees for that year. *Id.* By contrast, there were 13,823 refugees from Iraq in 2008, rising to 23% of the refugee population. *Id.* These numbers do not even fully represent the crisis in Iraq. A report from Amnesty International, citing UNHCR, estimates that 4.7 million people have been displaced outside Iraq. *Iraqi Refugees Facing Desperate Situation*, AMNESTY INTERNATIONAL, available at <http://www.amnesty.org/en/news-and-updates/report/iraqi-refugees-facing-desperate-situation-20080615>.

down and cried when it happened here.”¹¹² For those who may have already suffered, the process of expedited removal can serve to exacerbate psychological trauma induced by their prior persecution.¹¹³ Besides humanitarian concerns, however, there are legal and practical matters which can be broken down into four categories: lack of procedural due process, lack of substantive due process, subversion of policy goals, and the violation of international norms.

A. *Lack of Procedural Due Process*

The Fourteenth Amendment provides that no state shall “deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”¹¹⁴ In *Yick Wo v. Hopkins*, the Supreme Court stated that the Fourteenth Amendment was “universal,” and applied to “all persons within the territorial jurisdiction, without regard to any

¹¹² Craig Haney, *Study on Asylum Seekers in Expedited Removal As Authorized by Section 605 of the International Religious Freedom Act of 1998: Conditions of Confinement for Detained Asylum Seekers Subject to Expedited Removal*, POLITICAL ASYLUM RESEARCH SERV., available at <http://pard.org/study%20on%20asylum%20applicants%20in%20expedited%20removal%20conditions%20of%20confinement%20for%20detained.pdf>, at 190.

¹¹³ *Id.* at 192.

Among the commonsense generalizations that have been corroborated by research is the fact that persons who have psychological vulnerabilities *before* their incarceration are likely to suffer more problems later on, and that the greater the level of deprivation and harsh treatment and the longer they persist, the more negative the psychological consequences.

Id. See also *infra* notes 153-158 and accompanying text for further information on the psychological damages inflicted on refugees.

¹¹⁴ U.S. CONST. amend. XIV.

differences of race, of color, or of nationality.”¹¹⁵ There is no easy definition of the procedural safeguards to be afforded to immigrants, but case law does indicate that a fundamental aspect of due process is the right to be heard upon the matter.¹¹⁶ In the *Japanese Immigrant Case*, Justice Harlan held that administrative officers executing the provisions of statutes could not “disregard the fundamental principles” of due process.¹¹⁷ He further wrote,

One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard, before such officers, in respect of the matters upon which that liberty depends . . . Therefore, it is not competent for the Secretary of the Treasury or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien, who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law

¹¹⁵ *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). The issue in this case involved whether the plaintiff was denied a right in violation of the Constitution, laws, or treaties of the United States. *Id.* at 365. The Court examined the ordinances and supervisors of the county and city of San Francisco to determine if the ordinances and their enforcement were in conflict with the Constitution. *Id.* at 366. The ordinances prohibited the operation of laundry businesses in wooden buildings with permits, which were granted or withheld arbitrarily. *Id.* at 368. The petitioners contended that the ordinances were violations of the Fourteenth Amendment, and, in the alternative, that they were applied unequally against immigrants from China. *Id.* at 369. The Court concluded that the principles of the Fourteenth Amendment applied and left no room for exercises of personal, arbitrary power. *Id.* at 370. Though the law was valid on its face as an exercise of police power, it was applied in order to discriminate against Chinese laundry owners and could not be upheld. *Yick Wo*, 118 U.S. at 373-74.

¹¹⁶ *See, e.g., Japanese Immigrant Case*, 189 U.S. 86, 101 (1903).

¹¹⁷ *Id.* at 100.

are recognized.¹¹⁸

However, as this case points out, the circumstances here involved an alien who had been residing in the country for a significant period of time.¹¹⁹ This would not be the case for those who may be subject to expedited removal. Another case, *Nishimura Ekiu v. United States*, affirmatively addressed those who had not yet entered the United States, and held that the due process inquiry was not necessary for non-citizens entering the United States.¹²⁰ Therefore,

¹¹⁸ *Id.* at 101. An act of Congress forbade the immigration and importation of aliens who were likely to become paupers. *Id.* at 94. The Sundry Civil Appropriation Act held that where an alien was excluded, the decision of the immigration or customs officer was final unless reversed by the Secretary of Treasury. *Id.* at 96. It was decided that Congress could exclude some aliens on the basis and set certain conditions under which aliens could come into the country. *Id.* at 97. The problem arose, in this case, with the deportation of an alien without notice or the opportunity to present evidence that he was not in violation of the law. *Japanese Immigrant Case*, 189 U.S. at 99. The Court ultimately held that such a deprivation was denial of due process. *Id.* at 101.

¹¹⁹ *Id.*

¹²⁰ Ebba Gebisa, *Constitutional Concerns with the Enforcement and Expansion of Expedited Removal*, 2007 U. CHI. LEGAL F. 565, 578 (2007) (citing *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892)). In *Nishimura*, the Court discussed an immigration act of 1882 which imposed a fifty cent charge on alien passengers entering United States ports by vessels. *Nishimura Ekiu*, 142 U.S. at 661. The charge was paid to a collector of customs, who turned it over to the Treasury to be placed in an immigrant fund. *Id.* The Secretary of the Treasury enforced the Act and could board vessels to examine the condition of immigrants. *Id.* If the Secretary of the Treasury found “any convict, lunatic, idiot or any person unable to take care of himself or herself without becoming a public charge,” the Secretary would make a report in writing and forbid entry to such a person. *Id.* The petitioner was detained under this act. *Id.* The Court allowed an immigrant to file a writ of habeas corpus to determine whether being restrained and prohibited from entering the country was lawful. *Id.* at 660. However, the Court also held,

It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicil[e] or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law.

the traditional analysis affords the procedural due process guarantees of notice and opportunity to be heard to those immigrants who have been present, albeit illegally, while denying such safeguards to non-citizens upon first arrival in the port of entry.

Despite this apparent obstacle, it is relevant to note that there is both a legal and practical difference between an immigrant and a refugee. An alien is considered to be any person not a citizen or national of the United States,¹²¹ and an immigrant is any alien who is not excluded by various categories.¹²² Refugees, by contrast, are those outside their country who are unwilling or unable to return because of persecution based upon five factors: race, religion, ethnicity (nationality), membership in a particular social group, or political opinion.¹²³ On a more informal basis, an immigrant is one who comes to a country for permanent residence,¹²⁴ while a refugee is one who *flees* to a foreign country to escape danger.¹²⁵ It necessarily follows that different rights should be afforded to those who have no choice but to attempt entry into the United States than those who have voluntarily chosen to relocate, and it is precisely this group of people that is ultimately failed by the expedited removal procedure. Further, prior to the passage of expedited removal provisions, immigrants were statutorily given due process rights to be heard, to have representative counsel, and to appeal the decision prior to being removed.¹²⁶ Under expedited removal provisions, individuals who may have an asylum claim are denied any access to the court system until and unless an immigration officer deems those individuals to have a “fear of persecution.”¹²⁷

Nishimura Ekiu, 142 U.S. at 660.

¹²¹ Immigration and Nationality Act, 8 U.S.C. § 1101(a)(3) (2006).

¹²² Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15) (2006). These categories include, but are not limited to, ambassadors, temporary visitors, or those in immediate and continuous transit through the United States. *Id.* at §§ (A)-(V).

¹²³ UNHCR CONVENTION, *supra* note 24, at art. I(A)(2).

¹²⁴ MERRIAM-WEBSTERS COLLEGIATE DICTIONARY 621 (Frederick C. Mish et al. eds., 11th ed. 2003).

¹²⁵ *Id.* at 1047.

¹²⁶ Gebisa, *supra* note 120, at 568 (citing 8 U.S.C. §§ 1105a, 1362 (2006)).

¹²⁷ Immigration and Nationality Act, 8 U.S.C. § 1225(b)(1)(A)(i) (2006).

There are some procedural safeguards that have been implemented into the expedited removal process which are meant to replace the due process that had been stripped by the 1996 laws.¹²⁸ There are two forms, an I-867A form and an I-867B form, which immigration officers must use to assist in the interview process.¹²⁹ The I-867A lists information that the officer is to read to the arriving alien, which explains that the alien is apparently inadmissible, the alien may be removed without a hearing, and the alien should disclose any and all information at the present time.¹³⁰ Of particular importance is the fourth paragraph, which reads:

U.S. law provides protection to certain persons who face persecution, harm[,] or torture upon return to their home country. If you fear or have a concern about being removed from the United States or about being sent home, you should tell me so during this interview because you may not have another chance. You will have the opportunity to speak privately and confidentially to another officer about your fear or concern. That officer will determine if you should remain in the United States and not be removed because of that fear.¹³¹

This fourth paragraph is of extreme importance in advising potential asylum applicants of their rights; many refugees will have fled an urgent situation and not have had access to information about asylum availability in the United States.¹³² Many refugee-producing countries deliberately restrict access to this type of information in order to keep their intended victims from fleeing.¹³³ Therefore, it is imperative that immigration officers make sure to read this

¹²⁸ See generally U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, 2 *Report on Asylum Seekers in Expedited Removal: Expert Reports (2005)*, available at www.law.berkeley.edu/files/IHRLC/Volume_1.pdf, at 4 [hereinafter USCIRF REP.].

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² PISTONE & HOFFNER, *supra* note 73, at 167, 177.

¹³³ *Id.*

information to *each* arriving alien to ensure that those who are ill-informed of their rights are made aware prior to removal.

Despite the obvious importance of the I-867A, a report by USCIRF determined that in approximately half of inspections observed by researchers, the inspectors failed to follow that portion of the script and advise the arriving alien of his or her right to seek asylum.¹³⁴ When this provision was read, the arriving alien was seven times more likely to be referred to the next phase of the process, the credible fear determination.¹³⁵ By failing to inform arriving aliens of the right to seek asylum, the Department of Homeland Security is further in violation of the due process that should be afforded to potential asylum applicants.

The I-867B provides a list of three questions designed to elicit statements of potential fear of returning to the native country or country of last habitual residence.¹³⁶ These questions provide the best opportunity to determine whether the arriving alien may face persecution based on one of the five factors, and yet the USCIRF study found that inspectors fail to ask or record the answer to one or more questions on a repeated basis.¹³⁷ Since the inspectors were aware of the researchers observing them, it is reasonable to infer that the actual number of incomplete forms is much higher under normal conditions.

Procedural Due Process also requires that the deprivation of life, liberty, or property must be implemented fairly, and in *Mathews v. Eldridge*, the Court identified three factors to be considered: (1) the private interest that is affected; (2) the risk of erroneous deprivation

¹³⁴ *Id.* at 177-78 (citing USCIRF REP., *supra* note 128).

¹³⁵ PISTONE & HOEFFNER, *supra* note 73, at 178.

¹³⁶ USCIRF REP., *supra* note 128 (citing CBP Expedited Removal Training Materials (September, 2003)). The three questions are: (1) Why did you leave your home country or country of last residence? (2) Do you have any fear or concern about being returned to your home country or being removed from the United States? (3) Would you be harmed if you are returned to your home country or country of last residence? USCIRF Rep., *supra* note 128. Again, these questions are mandatory for immigration officers. *Id.*

¹³⁷ PISTONE & HOEFFNER, *supra* note 73, at 178-79 (citing USCIRF REP., *supra* note 128). The USCIRF study determined that between 5% and 15% of the I-867B forms were incomplete. PISTONE & HOEFFNER, *supra* note 73, at 178-79. This is particularly disturbing, as it allows for officers to abuse their position and potentially deny credible applicants.

of the interest through the procedures and the probable value of additional or substitute safeguards; and (3) the Government's interest and the burdens of additional or substitute safeguards.¹³⁸ Of particular concern with expedited removal is the second factor. As the decision process of the CBP official is not reviewable, DHS runs the risk that the decision could be made arbitrarily.¹³⁹ In its study on procedural protection, USCIRF concluded that,

Some procedures were applied with reasonable consistency, but compliance with others varied significantly, depending upon where the alien arrived, and which immigration judges or inspectors addressed the alien's claim. Most procedures lacked effective quality assurance measures to ensure that they were consistently followed.

¹³⁸ *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). *Mathews* was a Due Process case regarding the termination of Social Security disability benefit payments. *Id.* at 323. The issue was whether the Due Process Clause of the Fifth Amendment required that the recipient be given an opportunity for an evidentiary hearing. *Id.* *Eldridge* was awarded benefits in 1968, and in 1972, he received a questionnaire on which he indicated that his condition had not improved. *Id.* at 323-24. The state agency considered the reports he submitted and made a tentative determination that his disability had ended. *Id.* at 324. *Eldridge* disputed the termination, but the state agency made a final determination against him, which was then accepted by the Social Security Administration. *Id.* *Eldridge* was given the right to seek reconsideration by the state agency within six months. *Eldridge*, 424 U.S. at 324. *Eldridge* filed suit and challenged the constitutional validity of administrative procedures. *Id.* at 324-25. He contended that he had the right to an evidentiary hearing prior to the termination of his benefits. *Id.* at 325. The interest of individuals in Social Security benefits was recognized as a property interest protected by the Fifth Amendment. *Id.* at 332. The Court then identified three factors in determining whether due process was met. *Id.* at 334-35. Ultimately, the Court concluded that the administrative procedures of the agency complied with due process and an evidentiary hearing was not required to terminate disability benefits. *Id.* at 349.

¹³⁹ See PISTONE & HOEFFNER, *supra* note 73, at 185. The decision of a CBP to remove an arriving alien is reviewed by a supervisor, but GAO has reported that in up to three percent of cases, supervisors do not review the orders at all. *Id.* (citing U.S. GEN. ACCOUNTING OFFICE, Publ'n. No. GAO/GGD-00-176, *Opportunities Exist to Improve the Expedited Removal Process* (Sept. 2000), at 40-41.). Therefore, there are some cases in which expedited removal may be carried out based on the assessment of a single officer. See PISTONE & HOEFFNER, *supra* note 73, at 185.

Consequently, the outcome of an asylum claim appears to depend not only on the strength of the claim, but also on which officials consider the claim...¹⁴⁰

Considering the finality of the decision, this opens the door to too many variables in the hands of one or two officers who are not trained in the delicacies of refugee and asylum law.¹⁴¹

It is clear that DHS fails to provide the adequate procedural safeguards, and this is further complicated by the ultimate denial of due process rights to arriving aliens. If an arriving alien has a valid asylum claim but is erroneously denied by the officer through incomplete inspection or outright abuse of discretion, the alien will immediately be removed without any rights to challenge the decision.¹⁴² Thus, the most significant danger is that, due to lack of counsel and inability to seek judicial review, an alien can be sent back to a country where he or she may be persecuted or even killed and has no recourse to prevent such tragedy.

B. *Lack of Substantive Due Process*

Substantive due process forbids the government from infringing on certain fundamental interests unless the infringement is “narrowly tailored to serve a compelling state interest.”¹⁴³ In addition, substantive due process prohibits the government from conduct that

¹⁴⁰ USCIRF REP., *supra* note 128.

¹⁴¹ See generally PISTONE & HOEFFNER, *supra* note 73, at 190. “[A]sylum determinations require the special training of asylum officers. Because inspection officers do not have that training, they must recognize their limitations and refrain from making any judgments when fear is mentioned, except the judgment to refer the matter to an asylum officer.” *Id.* (citing CBP Inspector’s Field Manual). Ironically, the CBP Manual highlights that there are sometimes complicated and unusual situations in which asylum may be granted and warns CBP officers against judgments made on fear of persecution, torture, or return. CBP Inspector’s Field Manual § 17.15(d) (2001).

¹⁴² See generally INA § 235(b)(1)(A)(i) (1952). This statute provides that the alien will be removed “without further hearing or review.” *Id.*

¹⁴³ *Reno v. Flores*, 507 U.S. 292, 302 (1993) (citing *Collins v. Harker Heights*, 503 U.S. 114, 125; *United States v. Salerno*, 481 U.S. 739, 745 (1987); *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

“shocks the conscience,”¹⁴⁴ or impairs rights “implicit in the concept of ordered liberty.”¹⁴⁵ The issue of substantive due process is most apparent in the mandatory detention of immigrants who are awaiting the credible fear proceedings.¹⁴⁶

Despite the theory that arriving aliens may not have access to the typical procedural due process rights, the Supreme Court has clearly established that such aliens should be afforded some Constitutional protections.¹⁴⁷ In *Zadvydas*, for example, the Supreme Court explicitly held that a statute permitting the indefinite detention of an alien violated the Fifth Amendment Due Process Clause.¹⁴⁸ The expedited removal statutes seem to directly contradict this ruling, as they provide that any alien in the expedited removal process “shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed.”¹⁴⁹ Though this statute does not explicitly provide for “indefinite detention,” it is clear from the wording of the statute that there is no set time limit on how long the alien can be detained prior to the hearing or prior to removal.

Before the expedited removal statutes were enacted, aliens who arrived and sought asylum were allowed to enter the country and were given work authorizations.¹⁵⁰ Under this system, the asylum seeker could receive a work authorization, which at least arguably propagated fraudulent claims of asylum for those seeking work in the United States.¹⁵¹ Though the reasons for detention are sound, the

¹⁴⁴ *Salerno*, 481 U.S. at 745 (quoting *Rochin v. California*, 342 U.S. 165, 172 (1952)).

¹⁴⁵ *Id.* (quoting *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937)).

¹⁴⁶ See *PISTONE & HOEFFNER*, *supra* note 73, at 174.

¹⁴⁷ *GEBISA*, *supra* note 120, at 584 (citing *Zadvydas v. Davis*, 533 U.S. 687, 690 (2001); *Graham v. Richardson*, 403 U.S. 365, 371 (1971); *Kaoru Yamataya v. Fisher*, 189 U.S. 86, 100-01 (1903); *Wong Wing v. United States*, 163 U.S. 228, 242 (1896)).

¹⁴⁸ *Zadvydas*, 533 U.S. at 690.

¹⁴⁹ INA § 235(b)(1)(B)(iii)(IV) (1952).

¹⁵⁰ CRS REP., *supra* note 77, at 12.

¹⁵¹ See *id.* “As a result, many argued that the only way to deter fraudulent asylum claims was to detain asylum seekers rather than releasing them on their own recognizance. Indeed the practice of detaining asylum seekers has reduced the number of fraudulent asylum claims.” *Id.* (citing CRS Issue Brief IB93095, *Immigration: Illegal Entry and Asylum Issues*, coordinated by Ruth Ellen Wasem).

methods are not. Since many of these aliens have already established fear of persecution warranting further interviews,¹⁵² detention is particularly harsh in those situations. The United Nations High Commissioner on Refugees has argued that such detention may be “psychologically damaging” to those who have already undergone persecution and potential imprisonment and torture in their home countries or countries of last habitual residence.¹⁵³ This detention does not take into account the past suffering of the refugee, and to fully understand the effects detention may have on someone who has already been persecuted, it is vital to understand the psychological impact of persecution that may pre-date the individual’s detention in the United States. According to the Harvard Program on Refugee Trauma (HPRT), simply being a refugee puts one at a risk for mental health disorders because of the likelihood of violence associated with such a condition.¹⁵⁴ Indeed, studies suggest that psychiatric disorders are up to ten times more frequent in refugee populations than in control groups.¹⁵⁵ For those who have been tortured, researchers have suggested five elements of mental health consequences: (1) depression; (2) recurrent memories; (3) hyperarousal; (4) impaired memory and poor concentration; and (5) culture-dependent symptoms of emotional distress.¹⁵⁶ A large percentage of torture survivors suffer from Post-Traumatic Stress Disorder (PTSD).¹⁵⁷ A

¹⁵² See generally INA § 235(b)(1)(B)(iii)(IV) (1952).

¹⁵³ CRS REP., *supra* note 77, at 12 (citing OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, UNHCR REVISED GUIDELINES ON APPLICABLE CRITERIA AND STANDARDS RELATING TO THE DETENTION OF ASYLUM SEEKERS, Feb. 1999 p. 1).

¹⁵⁴ WooTaek Jeon et al., *Science of Refugee Mental Health: New Concepts and Methods*, HARVARD PROGRAM ON REFUGEE TRAUMA, at 2, available at <http://www.hpert-cambridge.org/documents/ScienceofRefugeeMentalHealth.pdf> [hereinafter HPRT]. The study points out that at the very minimum, refugees have been expelled from their homes and countries. *Id.* Far too frequently, the conditions are much worse and individuals have been starved, forced into labor, tortured, or witnessed the torture and murder of family and friends. *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ HPRT, *supra* note 154, at 60 (citing MOLLICA ET AL., *Assessing symptom change in Southeast Asian refugee survivors of mass violence of torture*, AM. J. PSYCHIATRY 147, 83-88).

¹⁵⁷ *Id.* at 60 (citing MOLLICA ET AL., *supra* note 156). According to the study cited, 71% of the responding group suffered from PTSD. MOLLICA ET AL., *supra* note 156.

hallmark feature of PTSD is the experience of flashbacks in which the sufferer may re-experience the torture.¹⁵⁸ For those who have been imprisoned during torture, mandatory detention seems the worst of punishment. It is important to note that the crucial issue in expedited removal proceedings is the refugee's credibility, and the honesty of the mentally ill applicant may be difficult to judge.¹⁵⁹ By detaining such traumatized individuals, the ability to ascertain the truth may be further complicated if psychological illnesses are exacerbated by the conditions of mandatory detention.

Mandatory detention relates to substantive due process for several reasons. First, as established above, substantive due process is violated when the an infringement is not narrowly tailored to a compelling state interest.¹⁶⁰ Though there is a compelling state interest in preventing fraudulent asylum claims, the problem arises with the "narrowly tailored" requirement. In the 2004 fiscal year, 22,812 aliens were detained by DHS, a number which has increased almost every year.¹⁶¹ These vast numbers suggest that at least some of these aliens could be released on their own recognizance as the old procedure dictated. In particular, those who have already established fear of persecution during their entry interviews would most likely pose a reduced risk of fraud and could be released. The sweeping detention of every alien who enters the country, seeks asylum, and is

¹⁵⁸ HPRT, *supra* note 154, at 83.

¹⁵⁹ *See id.* at 67. HPRT notes,

Victims of political violence, and particularly refugees, have been through extraordinarily difficult and disorienting experiences and it may happen that, in recalling episodes of his or her experience, the refugee will confuse the location or timing of various events or add details as they come to mind or as they grow more trusting of the interviewer. This may – quite unfairly – give the impression of unreliability, if not dishonesty.

Id.

¹⁶⁰ *See supra* note 143.

¹⁶¹ CRS REP., *supra* note 77, at 11-12. There was a slight decrease in detention population between 2001 and 2002, but every other year has shown an increase. *Id.* Most telling is the increase between fiscal years 1997 and 1998 (when the provisions of the IIRIRA were made enforceable). *Id.* During this time period, the number of detainees rose from 11,871 in 1997 to 15,447 in 1998, an increase of roughly 30%. *Id.*

subject to the expedited removal process is not narrow tailoring. Significant reform of the detention procedures would be a major step towards a more fair and just expedited removal system.

C. *Subversion of Policy Goals*

The main policy goal of expedited removal is to prevent entry to aliens who make false claims of asylum.¹⁶² However, the very policy goals the IIRIRA seeks to enforce are potentially undermined by the process. Asylum seekers are a particularly vulnerable population who have experienced the worst of conditions and often have little to no access to the information necessary to save their lives.¹⁶³ For those fleeing countries where they were persecuted or subject to persecution because of their race, religion, ethnicity, political opinion, or membership in a particular social group, country conditions may have been such that it was impossible or extremely difficult to access information regarding immigration and asylum policies in other countries. For example, civil war in Sudan

¹⁶² See generally CRS REP. RL33109 at 3-5, detailing the legislative history of expedited removal and similar provisions enacted to deal with the problem of rising numbers of immigrants with false documentation.

¹⁶³ See, e.g., PISTONE & HOFFNER, *supra* note 73, at 177, “[M]any applicants for admission are unaware of their right to ask for protection from return and must affirmatively be told about this right by the inspections officer.” *Id.* In fact, many refugees establish themselves in the United States and remain unaware of asylum law, the need to apply for asylum, or even the availability of such provisions which would give them legal status and protection. Michele R. Pistone & Philip G. Schrag, *The New Asylum Rule: Improved But Still Unfair*, 16 GEO. IMMIGR. L. J. 1, 25-26 (2001).

displaced nearly 500,000 people during its 22-year struggle.¹⁶⁴ During the 1980s and 1990s, the country banned political participation, detained and tortured people in the so-called “ghost houses,” and banned all independent journalism.¹⁶⁵ With such restricted freedom, people have less access to information regarding international law and ability to seek asylum.

In contrast, those who have falsified their travel documents for the purpose of defrauding the government will likely have been

¹⁶⁴ *Returns to South Sudan Top 300,000, Reports UN Refugee Agency*, U.N. NEWS SERVICE, Feb. 10, 2009, available at <http://www.unhcr.org/refworld/docid/49aff7b01e.html>. Sudan has had violent conflict since the country gained independence in 1953. *Background Note: Sudan*, U.S. STATE DEPARTMENT, available at <http://www.state.gov/r/pa/ei/bgn/5424.htm> (last visited Dec 29, 2009). The northern region of the country has traditionally ruled Sudan and imposed Islam, causing civil strife among non-Muslims and southerners. *Id.* A succession of governments was unable to bring peace to the country, and the regimes were unsympathetic to southern Sudan. *Id.* When Colonel Nimeiri took power in 1969, he negotiated with rebels and granted some autonomy to the southern region of the country. *Id.* When oil was discovered in the south, peace treaties giving the south autonomy were violated. *Id.* A second civil war began in 1983. *Id.* In 1986, elections were held and a civilian government was implemented. U.N. NEWS SERVICE, *supra* note 164. In 1989, however, General Umar al-Bashir led a coup and took over the government. *Id.* The 1990s continued war in the South, but regional governments attempted to intervene and bring peace to the country. *Id.* Finally, in 2002, the Machakos Protocol was signed, and in 2005, the Comprehensive Peace Agreement (CPA) was signed. *Id.* Despite this peace agreement, however, 2003 brought rebellion in Darfur, and there is still major work to be done in Sudan. *Id.*

¹⁶⁵ *Sudan Human Rights Conditions*, UNITED STATES BUREAU OF CITIZENSHIP AND IMMIGRATION SERVICES, Apr. 1, 1993, available at <http://www.unhcr.org/refworld/docid/3ae6a607f.html> (last visited Dec. 29, 2009).

coached through the process of arrival in the United States.¹⁶⁶ For example, in the mid-2000s, David Lynn charged people \$8,000 to create false stories of persecution and coach them on gaining asylum in the United States.¹⁶⁷ DHS requires that arriving aliens affirmatively claim a fear of persecution or state an intention to apply for asylum to avoid being immediately removed from the country.¹⁶⁸ As a result, those who are committing fraud and have been coached are more likely to be aware of this requirement and successfully make it through the process, while those with legitimate fears of persecution on return to their home country or country of last habitual residence will be confused and ignorant of the requirements. In effect, the expedited removal system allows honest people to slip through the cracks, while those entering based on fraud have better chances of gaining entry and asylum.

In addition, the expedited removal system may subvert the national security goals of expedited removal.¹⁶⁹ Of the current immigration policy, Professor Charles Kuck stated, “[n]ational security, if that is the primary goal of our immigration system, is most effectively enhanced by improving the mechanisms for

¹⁶⁶ See, e.g., Ben Finley & Matt Coughlin, *Feds: Asylum Seekers Coached to Lie*, BUCKS COUNTY COURIER TIMES, Jul. 30, 2008, available at <http://www1.phillyburbs.com/pb-dyn/news/111-07302008-1570213.html> (last visited Dec. 29, 2009). Along with Yevgeny Zemlyansky, Ilya Zherelyev, Anatoly Zagrinichiny, Akbar Kadirov, and Nelly Katsman, Lynn operated a business that filed false asylum applications. *Bucks County Man and Five Others Charged in Asylum Scam*, U.S. DEPARTMENT OF JUSTICE PRESS RELEASE, available at <http://www.justice.gov/usao/pae/News/Pr/2008/jul/lynnetalrelease.pdf> (last visited Dec. 29, 2009). The business filed at least 380 applications in its four-year operations, and Lynn and others made at least three million dollars. *Id.* Lynn was not actually an attorney and claimed he was running a “translation service.” *Id.* Lynn guaranteed clients he would obtain lawful asylum status for them, and to do so, he and his co-defendants fabricated claims of persecution based on religion, homosexuality, and ethnicity. *Id.* If convicted, Lynn will face up to 65 years in prison. *Id.*

¹⁶⁷ DOJ PRESS RELEASE, *supra* note 166.

¹⁶⁸ INA § 235(b)(1)(A)(i) (1952). “[T]he officer shall order the alien removed from the United States without further hearing or review unless the alien indicates an intention to apply for asylum under section 208 or a fear of persecution.” *Id.*

¹⁶⁹ See generally Kristen M. Jarvis Johnson, *Fearing the United States: Rethinking Mandatory Detention of Asylum Seekers*, 59 ADMIN. L. REV. 589, 593-602 (2007).

identifying actual terrorists, not by implementing harsher or unattainable standards or blindly treating all foreigners as potential terrorists.”¹⁷⁰ Simply holding false documents (which may have been the only way for the alien to escape the country of persecution) or possessing no documents at all does not make one a threat to national security, and therefore, the detention of such aliens mandated by the expedited removal system is unnecessary.¹⁷¹

D. *Violation of International Norms*

One final problem with expedited removal is its condemnation by various international agencies and the violation of international refugee law principles. One of the most glaring examples of this is the principle of *non-refoulement*. The 1951 Convention and Protocol Relating to the Status of Refugees, states: “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion.”¹⁷² This is both an obligation to the United States as a signor of the Protocol as well as an international norm.¹⁷³ When principles become international norms, they are then obligatory for even non-signors to the Treaty.¹⁷⁴ Despite this obligation to comply with the principles of *non-refoulement*, the expedited removal process may fall short of providing this guarantee to all refugees.¹⁷⁵ While a shortened

¹⁷⁰ *Id.* at 594 (quoting *Refugees: Seeking Solutions to a Global Concern*, HEARING BEFORE THE SUBCOMM. ON IMMIGRATION, BORDER SECURITY, AND CITIZENSHIP OF THE S. COMM. ON THE JUDICIARY, 108 Cong. 62 (2004) [hereinafter *REFUGEES: SEEKING SOLUTIONS TO A GLOBAL CONCERN*] (statement of Prof. Charles H. Kuck)). Professor Kuck is an Adjunct Professor of Law at the University of Georgia School of Law and a Partner at Weathersby, Howard, and Kuck LLC in Atlanta, Georgia. *Refugees, Seeking Solutions to a Global Concern*, at (II), available at <http://www.loc.gov/law/find/hearings/pdf/00137802971.pdf>. Kuck was the Managing Partner of the Immigration Group at his law firm and was called to testify for the Committee on the Judiciary. *Id.* at 12.

¹⁷¹ See generally JOHNSON, *supra* note 169, at 594 (2007).

¹⁷² UNHCR HANDBOOK, *supra* note 21, Art. 33.

¹⁷³ CROWE, *supra* note 82, at 299.

¹⁷⁴ *Id.* at 299-300.

¹⁷⁵ See generally *id.* at 304-09.

interview process may be warranted and even just, it can only be so if procedural safeguards are followed in each instance.¹⁷⁶ As demonstrated above, this does not happen.¹⁷⁷ Simply put, the current state of the expedited removal process allows aliens to be removed to countries where they have a fear of being persecuted, and this directly contradicts international law.

The expedited removal system is not entirely unique to the United States. In fact, European countries were the first to implement expedited processes for handling arriving aliens.¹⁷⁸ Major European countries were operating some system of expedited removal by 1994, including Belgium, Germany, and Switzerland.¹⁷⁹ The European system of expedited removal typically identifies individuals who have come from “safe states,” and these individuals are then processed rapidly.¹⁸⁰ This is a notable difference from the U.S. system of expedited removal, which does not take into account country of origin. Instead, expedited removal applies to all arriving aliens. In addition, the German system of expedited removal provides a good contrast to the American law. In Germany, an alien who is processed through rapid procedures has three days to file an appeal in an administrative court.¹⁸¹ Such administrative appeal is

¹⁷⁶ *Id.* at 306.

¹⁷⁷ *See supra* notes 134-135.

¹⁷⁸ Susan F. Martin & Andrew I. Schoenholtz, *Asylum in Practice: Successes, Failures, and the Challenges Ahead*, 14 GEO. IMMIGR. L.J. 589, 602 (2000).

¹⁷⁹ *Id.* (citing Helene Lambert, SEEKING ASYLUM: COMPARATIVE LAW AND PRACTICE IN SELECTED EUROPEAN COUNTRIES 29 (1995)). Notably, Germany is one of the world’s leading countries for the acceptance of refugees and posted a refugee population of 582,735 as of 2008. *2008 Global Trends, Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons*, UNHCR, June 2009, available at <http://www.unhcr.org/49c796572.html> (last visited Dec. 29, 2009). The United States had 279,548 refugees in the same year. *Id.*

¹⁸⁰ MARTIN & SCHOENHOLTZ, *supra* note 178, at 602. Some countries, such as Germany, have explicitly stated which countries are considered safe. *Id.* at 606. Other countries provide criteria to assess whether or not a country is safe. *Id.* at 607. Austria has stated that all parties to the Refugee Convention are safe countries. *Id.* This determination could be problematic, as most countries have signed the Convention and/or the Protocol, and some countries, such as Rwanda, are party to the treaty, and yet are clearly not historically safe countries. *Id.*

¹⁸¹ *Id.* at 602 (citing Kathleen Marie Whitney, *Does the European Convention on Human Rights Protect Refugees from “Safe” Countries?*, 26 GA. J. INT’L & COMP. L. 375, 391 (1997)).

conspicuously absent from the U.S. procedure. In fact, there is no form of review available to aliens subjected to expedited removal.

The Canadian asylum system also employs the safe third countries idea, and it provides a good comparison to the U.S. system.¹⁸² An alien arriving in Canada can make an asylum claim to a Canada Border Services Agency (CBSA) officer immediately upon arrival at a port of entry.¹⁸³ The officer interviews the applicant, and the applicant will then be sent to the Refugee Protection Division of the Immigration and Refugee Board (IRB), unless the officer determines the applicant ineligible.¹⁸⁴ This process is thus substantially similar to the United States expedited removal process, but the grounds of ineligibility do not include the lack of documentation.¹⁸⁵ There are four grounds on which an applicant may be determined ineligible under the Canadian protocol: (1) the applicant has already been granted refugee protection in Canada or another country; (2) the applicant has previously been refused refugee protection in Canada; (3) the applicant came to Canada from or through a safe third country where refugee protection could have been claimed; or (4) the applicant is a security risk, has violated international rights, has committed a serious crime, or has been involved in an organized crime.¹⁸⁶ If the claim is not made ineligible on one of those grounds, it will be referred to the Refugee Protection Division, and if the officer has not made a decision within three days, the claim is automatically sent to the IRB.¹⁸⁷ Though Canada has a substantially similar system to the U.S. expedited removal process, there is additional protection for refugees without sacrificing safety or efficiency.

Besides running afoul of international norms, the process and methods of expedited removal have come under the scrutiny and disapproval of international agencies. UNHCR, for example, the

¹⁸² See generally *An Overview, Immigration and Refugee Board (IRB)*, IMMIGRATION AND REFUGEE BOARD OF CANADA available at <http://www.irb-cisr.gc.ca/Eng/brdcom/publications/oveape/Pages/index.aspx#rpd3> [hereinafter IRB Overview].

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ IRB Overview, *supra* note 182.

¹⁸⁷ *Id.*

leading world organization for dealing with refugees, has spoken out against the detention of asylum seekers as “inherently undesirable.”¹⁸⁸ Further, the ubiquitous use of national security as a justification for restrictive policies has also garnered some criticism.¹⁸⁹ For example, in response to the enactment of the REAL ID Act, which created greater obstacles and imposed more restrictions on asylum eligibility, UNHCR stated: “While UNHCR fully supports states’ efforts to prevent terrorists from abusing asylum programs, we believe the provisions of H.R. 418 that impact refugee protection do not achieve this goal and could prevent those truly at risk of persecution from finding safety in the U.S.”¹⁹⁰ The disapproval of agencies such as UNHCR affects the perception of the United States throughout the rest of the world. As a leader in human rights, the policies of the United States are particularly important; other countries see the United States as a leader and will potentially use U.S. policy as the standard by which they measure their own laws and regulations.¹⁹¹ When the U.S. policy is a violation of procedural and substantive due process as well as international law and states’ policy goals, this is an undesirable result.

¹⁸⁸ CRS REP., *supra* note 77, at 12.

¹⁸⁹ See generally Victor P. White, *U.S. Asylum Law Out of Sync with International Obligations: REAL ID Act*, 8 SAN DIEGO INT’L L.J. at 211, 252-53 (2006). This article suggests that restrictive policies, such as the REAL ID Act restricting asylum eligibility and judicial review of deportation orders, have deeper motives than the cited “national security” concerns. *Id.* White points out that following September 11th, there was an outpouring of national security legislation initiated by the War on Terror. *Id.* However, fear of terrorism, while a factor, was not the sole determinant behind such legislation, which may have also been caused by a desire to prevent judicial activism. *Id.* at 211-12.

¹⁹⁰ WHITE, *supra* note 189, at 252 (quoting Letter from UNHCR to Rep. Zoe Lofgren (Feb. 4, 2005)).

¹⁹¹ Stacey L. Sobel, *The Mythology of a Human Rights Leader: How the United States Has Failed Sexual Minorities at Home and Abroad*, 21 HARV. HUM. RTS. J. 197 (2008).

The United States is typically held to a higher human rights standard than other countries. It is not enough for the United States to follow other countries; the United States is expected to lead the charge. When it does not lead, other nations may lack the incentive to meet the highest human rights standards, because merely meeting our level would be sufficient.

Id.

VI. SUGGESTIONS FOR IMPROVEMENT

The uncertain nature of expedited removal and the lack of judicial review makes examination of the actual consequences impossible. It is only through cases such as the situation of Libardo Yepes,¹⁹² which are caught prior to the worst violations, which reveal the flawed inner workings of the system. As established, America is a country of refugees and a nation founded on principles of kindness, aid, and generosity to the oppressed and downtrodden of the world. The security threats of a post-9/11 world and the rising concerns with terrorism in a technological age have complicated the goals of the Founding Fathers. In order to return the country to something closer to the vision of George Washington and other national heroes, significant reform must take place. Expedited removal, with its laudable goals and flawed mechanisms, is a perfect place to begin such reform in order to once more make this country a beacon to the oppressed and persecuted. I suggest three main areas of improvement: (1) right to counsel; (2) effective training; and (3) increased concentration on humanitarian goals.

A. *Right to Counsel*

As established, arriving aliens have no right to counsel during the expedited removal process.¹⁹³ When one imagines the typical scenario for a genuine asylum-seeker in the United States, arriving at a port of entry without valid travel documentation, it is easy to conceive of at least some level of fear and confusion. The alien may not speak English, and it may be difficult to locate a translator. The alien may be ignorant of asylum procedures, and the flight may have been motivated by an imminent threat of violence or death. The alien is now subject to an unknown process, potentially shackled, and threatened with return to the country of persecution. Throughout this

¹⁹² See *supra* note 2 and accompanying text.

¹⁹³ See *supra* notes 126-127 and accompanying text. Notably, there is a right to seek counsel for asylum applicants who apply affirmatively or defensively, but there is no right to counsel at no charge to the applicant. MARTIN & SCHOENHOLTZ, *supra* note 178, at 596. This in and of itself may be problematic, but the relevant statutes at least provide for counsel, while those in expedited removal may not seek assistance of any kind.

process, there is no one the alien can consult, and there is no one to ensure that safeguards are followed and rights are protected.

Since there is no right to counsel during expedited removal, there is no data to help evaluate the need, or lack thereof, for such assistance. However, we can look to claims filed affirmatively to determine whether counsel is needed. In 1999, for example, applicants were granted asylum four to six times as often when represented.¹⁹⁴ Similar results would likely occur if aliens had the right to representation during the expedited removal process. The number of asylum cases in the United States and the number of arriving aliens clearly calls for a process such as expedited removal. However, the lack of supervision likely allows some genuine asylum-seekers to be returned to a place of persecution. Allowing assistance of counsel would not substantially affect the ability of the government to rapidly process claims. Although it may present some delays, the effects would likely be minimal.¹⁹⁵ The process could remain largely the same, but instead of unsupervised inspections, the alien would have the right to an attorney who could explain the process, ensure that the inspector followed procedure, and alert the alien to any rights he or she may have.

Studies show that even the most basic assistance has been denied by inspectors.¹⁹⁶ For example, some inspectors have failed to provide interpreters even when requested by the alien.¹⁹⁷ In more

¹⁹⁴ MARTIN & SCHOENHOLTZ, *supra* note 178, at 595.

¹⁹⁵ In fact, some argue that typical asylum cases are actually more efficient when the alien is represented by counsel. *Id.* at 595.

Many adjudicators and practitioners believe that when aliens are represented in proceedings, cases move more efficiently, economically, and expeditiously through the system. Issues presented for decision by the immigration courts and on appeal are more readily narrowed. Simply put, these observers argue, when aliens in proceedings or on appeal have legal representation, the system works better.

Id.

A similar effect could be seen in expedited removal. The attorney could consult the client and rapidly and effectively present the claim to the inspectors.

¹⁹⁶ PISTONE & HOEFFNER, *supra* note 73, at 175-92.

¹⁹⁷ *Id.* at 184 (citing USCIRF REP., *supra* note 128, at 31).

extreme instances of abuse, inspectors have falsely claimed that statements were made by aliens.¹⁹⁸ Such abuse would not stand if counsel was available to aliens, and the presence of an attorney in the inspection would undoubtedly minimize, if not eliminate completely, such grave abuses.

Simply put, arriving aliens are unlikely to be aware of the intricacies of the asylum law and their rights to seek protection in the United States. Effective assistance of counsel would ensure that the alien is apprised of legal rights and is fully aware of the effects of his or her words and actions on the CBP inspectors. Legal assistance would also provide for accountability among CBP and minimize the possibility that the system will be abused. Because appeal and judicial review are prohibited, a right to counsel would keep the process streamlined while providing at least some additional level of protection to a vulnerable population.

B. *Effective Training*

One of the most troublesome points of expedited removal is that it is handled entirely by Customs and Border Patrol officials who are not trained in asylum.¹⁹⁹ Refugee and asylum law is a growing specialization, and it represents a unique niche in the law, which requires specific training and understanding. Immigration is inherently civil, and yet there are matters of life and death involved.²⁰⁰ As the Harvard Program on Refugee Trauma demonstrated, there are extremely sensitive mental health issues that may be at play,²⁰¹ and CBP officials simply lack the requisite training to deal with these matters. Considering the huge discretion given to these officers, it is vital that they be given more rigorous training to

¹⁹⁸ *Id.* at 182-83 (citing USCIRF REP., *supra* note 128, at 55). In the study, USCIRF researchers observed situations in which the inspectors indicated that they had asked questions and included the responses, when in reality, the questions were never asked at all. USCIRF Rep., *supra* note 128, at 55.

¹⁹⁹ *See supra* notes 85 and 141.

²⁰⁰ *See, e.g., Cardoza-Fonseca*, 480 U.S. at 449 (1987). "Deportation is always a harsh measure; it is all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country." *Id.*

²⁰¹ *See supra* notes 154-159.

ensure that they properly deal with the unique and delicate situations presented by potential refugees. The handling of these claims requires sensitivity and compassion, as well as a thorough understanding of U.S. asylum law.

Alternatively, asylum officers could oversee the process. As studies demonstrated, CBP officers have abused discretion and failed to follow the procedural safeguards meant to protect asylum applicants.²⁰² When allowed to monitor itself, CBP has failed in the most crucial aspects of the secondary inspection. If EOIR asylum officers were brought in to the expedited removal system, their expertise would add an additional level of accountability. Officers trained in matters of asylum would be available not only to monitor inspections, but also to identify the behaviors and claims that lend credibility to a request for asylum.

It is far too easy for a single CBP inspector to abuse discretion when all that is required for a final order of deportation is the approval of a supervisor. Studies have even shown that this supervisory review has at times been conducted by someone other than the appropriate supervisor.²⁰³ Therefore, it is appropriate and necessary to provide either extensive training to current CBP officers or the supervision of a separate agency to guard against abuses.

C. Increased Concentration on Humanitarian Goals

Along with increased security concerns has come a shift in attitude towards refugees. In order for any implemented changes in expedited removal to be truly effective, there must be a renewed focus on the humanitarian goals of asylum. Though there are inherent national security concerns in the admittance of immigrants to the country, there are many deserving people who may be injured or killed if they are not protected by the United States government. The focus on enforcement is likely an impediment to honest conversation with arriving aliens. Those who have suffered extreme stress and who may be suffering from psychological conditions such as PTSD need to be treated with compassion, and instead come face

²⁰² See *supra* notes 129-137.

²⁰³ PISTONE & HOFFNER, *supra* note 73, at 186 (citing U.S. GEN ACCOUNTING OFFICE, Publ'n No. GAO/GGD-00-176, *Opportunities Exist to Improve the Expedited Removal Process* (Sept. 2000), at 44).

to face with those who seek to deport them. HPRT emphasizes that trust is fundamental to interviewing potential victims of torture.²⁰⁴ Although inspection in the context of expedited removal is just preliminary and the claims will be further investigated later in the process (assuming the alien progresses), the same ideas apply. A traumatized torture victim arriving without documentation must be handled gently, with compassion, and with understanding about the potential horrors he or she experienced prior to arrival in the United States. Without this humanitarian focus, aliens may be further traumatized and unlikely to be honest or forthcoming.

Such a massive overhaul of the culture of enforcement agencies like CBP takes time and significant reform. However, a renewed emphasis on humanitarian ideals within and outside these agencies is an essential step toward making the expedited removal process truly fair and effective.

VII. CONCLUSION

Senator Edward M. Kennedy wrote:

Immigration is in our blood. It's part of our founding story. In the early 1600's, courageous men and women sailed in search of freedom and a better life. Arriving in Jamestown and Plymouth, they founded a great nation. For centuries ever since, countless other brave men and women have made the difficult decision to leave their homes and seek better lives in this Promised Land.²⁰⁵

Kennedy makes an important point and emphasizes an idea that has continued to be a part of our national rhetoric: this is a country founded by immigrants, and we must remain true to our heritage. However, there is a darker side to immigration. Every year, hundreds

²⁰⁴ HPRT, *supra* note 154, at 70. "Establishing trust is a fundamental step in interviewing victims who must be convinced that the interviewer wants to hear their story, are prepared to spend some time listening and recording the details, and are prepared to respond to their concerns about confidentiality or other worries." *Id.*

²⁰⁵ KENNEDY, *supra* note 45, Introduction by Senator Edward M. Kennedy.

of thousands of people do not choose to leave their homes, but rather are forced by their persecutors to flee. Before there was an “American Dream,” there was an idea, held by people like George Washington, that this nation was to be a refuge for oppressed peoples of the world. Along with economic woes and terrorist attacks, the nation has drifted further and further from its beginnings as a safe haven. In order to return to the true American Ideal, a balance must be struck between enforcement of national security and the humanitarian concerns of the persecuted. Through the implementation of slight changes in the expedited removal process, like effective supervision, training, and legal assistance, expedited removal can continue to efficiently handle arriving aliens in the United States while ensuring that each alien is treated fairly and that genuine asylum applicants will not be overlooked.

